



BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of Courts Below.

The District Court's opinion (Judge Campbell) is at page 568 of the Record (Reported at 62 U. S. P. Q. 178). His supplemental opinion is at page 577, and his findings of fact and conclusions of law at page 578 of the Record.

The Court of Appeal's opinion (Judge Kerner) is at page 623 of the Record. It is reported at 65 U. S. P. Q. 553.

Jurisdiction.

The petition, on page 2, sets forth the grounds on which jurisdiction is invoked.

A Statement of the Case and Questions Involved.

The petition sets forth, on pages 2 to 12, a statement of the questions involved, and a brief summary of the material facts necessary to an understanding of the case, and also the reasons relied upon for the allowance of the writ. The facts are enlarged upon in the ensuing argument.

Summary of Argument.

The argument is summarized in the foregoing petition and in the following:

ARGUMENT.

I.

Statement.

The District Court found the copyrights valid. That holding was not reversed by the Appellate Court.

The contents of the publication are admittedly proper subject of copyright. There is not one particle of evidence, and indeed no assertion, that the publication as a whole or any of the component parts asserted, below and here, were or can be found in the public domain. That being so, the only remaining question is whether the respondents are guilty of infringing, not only petitioner's publication as a whole, but any of the copyrightable component parts asserted.

The undisputed evidence shows that the publication as a whole was originated and prepared by petitioner through its employees (R. 64, 67, 68, 355, 360, 393, 394) and that the component parts, such as the master airline chart, the airline maps of Central and South America, the contents section and listing sections were originated and prepared by petitioner's employees. There is not one scintilla of evidence that the model for either can be found in the public domain or that anyone except petitioner's employees contributed one iota to their production. The corresponding map appearing on the inside of the back cover of respondents' publication (see particularly the August 1943 issue Plaintiff's Exhibit 26) is substantially identical in all respects. Mere ordinary observation would certainly cause the accused copy to be recognized as being taken from petitioner's. The same is true as to the Central and South American maps and the contents section. Respondent

utterly failed to produce anything in the public domain which corresponded in the slightest with any of the component parts. They did say they referred to some other maps, which they produced, (some in the public domain and some not), but whether or not they were in the public domain, each and all are substantially different and do not present any similarity to the expression, arrangement, style and garb of petitioner's and respondents' charts and maps.

There is no proof whatever in the case that the layout, expression, style, arrangement and garb of the listing sections were in the public domain. The evidence shows very clearly and the District Court found (R. 579-580) that the layout, expression, style and garb was conceived and originated by petitioner through its employees, at its own time and expense and for its own purpose (R. 64, 67, 68, 355, 360, 393, 394). There is no evidence that the airlines or any outsider initially prepared or contributed to the preparation of the style, expression, and garb of the component parts identified as the listing sections. The airlines merely, as admitted by witnesses on both sides (R. 360, 437, 438), noted corrections and changes for new editions, *on layouts or tear sheets initially prepared by petitioner at its own expense*. Most of them also paid a nominal listing fee.

As this court said in *Bleistein v. Donaldson*, 188 U. S. 239, at page 248, in holding that the copyright on the circus posters there involved, which had been made by the plaintiff for advertisements of a circus owned by one Wallace, was taken out properly by plaintiff:

“There was evidence warranting the inference that the designs belonged to the plaintiffs, they having been produced by persons employed and paid by the plaintiffs in their establishment to make those very things.”

So it is with the case at bar, the employees who made petitioner's master airline chart, its maps of Central and South America, its contents section, and the expression, style, garb, arrangement and combination of petitioner's listing sections were each and all produced by persons employed and paid by the petitioner in their establishment to make those very things.

Page after page of the listing sections appearing in the respondents' accused publication, as admitted by their own employees, were copied, both directly and indirectly, from petitioner's publication (R. 365, 367, 423, 449, 523). The listing sections are substantially identical with petitioner's in *expression, layout, style, arrangement and garb*. Clearly, ordinary observation would cause the accused copy of the listing sections to be recognized as being taken from petitioner. In view of this and the further facts heretofore pointed out in the petition it is clear that the respondents used plaintiff's copyrighted publication and the component parts thereof as their *model* for respondents' publication and *its component parts*.

The copyrights on such component parts are valid unless such component parts are proven to be in the public domain. The burden is heavily on the respondents so to do. There is not one scintilla of evidence in the entire record that the expression, style, garb and arrangement of the component parts of petitioner's publication asserted below and here, including the listing sections, can be found in the public domain.

Respondents introduced a number of prior maps, but none of them show anything even approaching petitioner's charts or maps as having been in the public domain. They also introduced a large scrap book (Def. Exh. M) containing a large amount of belated correspondence between the respondents and various airlines, and data received from

several airlines. This fails to show that petitioner's publication or any of the component parts here asserted were in the public domain, but does tell us, louder than words, that respondents used petitioner's publication as their model and copied therefrom, both directly and indirectly, particularly as to expression, style and garb. Moreover, this material furnished respondents by the airlines did not contain petitioner's expression, style and garb. That was taken from petitioner's copyrighted publication.

The District Court found (R. 570) that respondents copied petitioner "in the general style, arrangement, form and garb * * * with a few insignificant changes in coloring and lettering".

The District Court, after referring to the fact that Chase was petitioner's ex *alter ego* and had entered the employ of the respondents on January 2, 1943 said (R. 570):

"He commenced immediately on getting printers' bids and assembling material for the defendants' publication, the first issue of which was planned for March 1943. In early February, Chase advised Parrish (defendants' president) that he could no longer continue with the work due to legal advice which he had received to the effect that the work he was doing constituted a violation of plaintiff's copyright. * * * Defendants stopped work on the proposed March issue and started assembling material for a first issue to be released in April of 1943. The source material for this initial issue of defendants' publication is in evidence and although defendants' employees state that it was entirely made up without copying from plaintiff's publication, I am convinced from a review of it that plaintiff's publication was the source of a great part of the material.

"Comparing the defendants' accused issues with the plaintiff's copyrighted issues, it is apparent that the general style, arrangement, form and garb of the plaintiff's publication has been copied by the defendants with a few insignificant changes in coloring and

lettering. In view of the uncontroverted evidence that the defendants' employees had issues of plaintiff's publication before them when preparing material for defendants' publication; in view of the striking similarity in the two publications; in view of the defendants' previous efforts to buy plaintiff's publication; in view of defendants' use of plaintiff's editor Chase and their selection of plaintiff's printers; in view of certain common errors set forth in the briefs, which are found in plaintiff's copyrighted issues and defendants' accused issues, it is my opinion that the defendants set out to and did produce a copy of plaintiff's copyrighted publication which they proposed to exploit through their alleged better contacts with the aviation industry."

The Court further said (R. 571):

"although in this case an explanation for such common errors was offered * * * nevertheless the explanation when considered in the light of all the testimony and a review of the exhibits fails to convince me of its genuineness."

The appellate court, in its opinion, discussed at length the *external* appearance of the respective publications (R. 624-625) and also *unfair competition* (R. 623, 630-631). Those matters were not involved or asserted below. It seems, therefore, quite clear that the reviewing court was not only confused as to the issues, but being so confused, disregarded the facts and law applicable to the *real* issue.

The issue and matter involved below was whether petitioner's copyrights were valid and infringed and petitioner's property rights thereby violated.

The appellate court also assumed a situation with respect to one of the component parts asserted, namely, the listing sections, and on those assumed facts, which are contrary to the facts found by the District Court and amply established by the record, concluded in effect, that

the petitioner was not entitled to any relief, even though such listing sections had been copied exactly by respondents from petitioner's copyrighted publication and said (R. 628):

"Jeweler's Circular Pub. Co. v. Keystone Pub. Co., 274 Fed. 932, aff'd 281 Fed. 83, is distinguishable because there the plaintiff had at its own expense created the directory and had produced the illustrations of the trade-marks from cuts generally prepared 'by the plaintiff personally,' whereas here the airlines paid plaintiff to print their listings and their employees played a major role in creating them."

Even though the airlines did what the court said, which they did not, that wouldn't change the rule of law or the principle announced in the *Jeweler's* and other cases. The things on which the court relied to distinguish *do not exist in this case*. The facts are to the contrary. The District Court so found (Finding No. 4, R. 579-580). Such finding is amply supported by the evidence.

Instead of the airlines paying petitioner for printing their listing sections and their employees playing a major roll in creating them, the evidence clearly shows to the contrary.

First: Petitioner and its predecessor, through their employees, and at their own time, labor and expense, obtained facts and information relating to air travel, airmail, air express, etc., from various sources through correspondence, telephone calls, personal calls, telegrams, etc., and then created the "Official Guide of the Airways" through their own skill, labor and judgment, using their own original *expression*, treatment, layouts, *style* and *garb* for such sections and other component parts, combined with their own original master airline charts of the United States and maps of Central and South America and contents section, confining the layout to petitioner's own exclu-

sive dimensions, column and page width, style and garb (R. 64, 67, 68, 355-356, 360, 393, 394). This was all done by petitioner through its employees as an inherent part of its publication for its own exclusive use in its copyrighted publication (R. 356). In doing so, neither the petitioner nor its employees were acting in any way as representatives or employees of the airlines nor were they requested, commissioned or paid for so doing by any of the airlines (R. 64, 67, 68). The District Court so found (R. 580).

Second: During the early period the listing sections, containing facts and information clothed in petitioner's own *expression, style and garb*, were carried as to all the airlines in the United States, without any fee or cost whatever to any of them (R. 357).

Third: Petitioner early originated and adopted its own *expression, style and garb* for its listing sections, depicting therein facts, concerning any airline, complete as to information relating to flights, fares, airports, ground transportation, principal ticket offices and cities served, general offices, officers and baggage limitations (R. 64, 67, 68, 355, 360, 393, 394). About September 1930 petitioner asked the airlines to pay a small *listing* fee, which was figured out, not as an advertising rate, but as a nominal listing fee (R. 358). Most of the airlines were quite willing to pay this nominal listing fee.

Fourth: The *expression, style and garb* for the listing sections was originally conceived, prepared and published by the petitioner at its own time and expense and for its own purposes, and not at the instance or request of the airlines (R. 64, 67, 68, 355, 360, 393, 394). However, the petitioner followed the general policy, *admitted by respondents' witnesses*, of preparing and submitting to the airlines each month its own layout embodying petitioner's original expression, style, garb and make-up for the next

new edition. On this the airlines generally noted corrections or current changes as to facts (R. 360). It is admitted by defendants' witness Fry that this was the standard practice of petitioner (R. 437 and bottom page 436, *et seq.*). There can be no dispute about that.

The layout, expression, style and garb of the listing section of petitioner's publication being its own, prepared at its own time and expense, it was at *all times reserved by the petitioner as being its property and under its control.*

District Judge Campbell found from the open court evidence as follows (R. 579-580):

"4. Plaintiff and its predecessor, through their employees, and at their own time, labor and expense, obtained information and facts regarding air travel, airlines, etc., from various sources and then created the publication now known as the 'Official Guide of the Airways' through their own skill, labor and judgment, by compiling, editing and collocating the information and material obtained, using their own original plan of compilation, expression, treatment, sequence, arrangement, style and garb, combined with master charts or maps, confining the layouts to their own exclusive page dimensions, column and page widths, all for the purpose of maintaining general uniformity for readily and quickly giving information to the average passenger concerning air travel, and to afford a fast, efficient reference or compilation of a high degree of readability. This was all done by plaintiff and its predecessor at their own time and expense through their employees as an inherent part of their publication or compilation for their own exclusive use in their copyrighted publication. In doing so, neither the plaintiff nor any of its employees were acting in any wise as employees or representatives of the respective airlines represented in plaintiff's publication."

There is no finding or holding whatever by the Court of Appeals that the component parts asserted below and here,

namely, the master airline chart on the inside of the front cover of petitioner's and on the inside of the back cover of respondents', the South American map, and the contents section, are not substantially identical, *because they are*. Nor is there any finding or holding by the Court of Appeals that the *expression* and the *style* and *garb* of the listing sections of respondents are not substantially identical with the *expression, style* and *garb* of petitioner.

The District Court found (R. 580) that not only the copyrighted publication as a whole was conceived, originated and created by the petitioner through its employees, but the "expression, style and garb" of the listing sections (R. 580) and the maps (R. 581) were conceived and originated by the petitioner through its employees, which were the principal component parts relied upon in the District Court. The court further found (R. 586) that the petitioner's copyrights covered its publication, not only as a whole, but also "all component parts thereof". There is no finding or holding by the Court of Appeals that these component parts were in the public domain, or that the expression, style and garb of these component parts were not conceived and originated by petitioner, or that the respondents' corresponding component parts, and the expression, style and garb were not substantially identical. On the contrary, the Court of Appeals went off on an erroneous theory, and by making a *sequence comparison of the entire book* and finding that the sequence as a whole was not identical, concluded therefrom that there was not enough similarity with reference to sequence and arrangement as a whole to make out infringement. It apparently overlooked entirely or disregarded completely the fact that the expression, style and garb of the principal component parts asserted below and here above mentioned are substantially identical, and that the Copyright Act affords protection on each component part.

Every member of the public is entitled to publish the facts depicted in such listing sections, and it is being done in various different publications, but that fact does not permit a competing publisher to copy petitioner's own *expression*, style and garb in which the facts are clothed. The copyright on such component parts is valid unless it is clearly proven to be in the public domain. There is not one scintilla of evidence in the entire record that the *expression, style, garb and arrangement of the component parts* of petitioner's publication, such as the master airline charts of the United States appearing on the inside front cover, the chart of South America appearing in each edition of petitioner's copyrighted work, the contents page, and the listing sections, or indeed the publication as a whole, can be found in the public domain. In fact, there is not even any assertion by the respondents to that effect.

II.

Copyrights on a Publication Not Only Protect the Publication as a Whole, but All of the Copyrightable Component Parts of the Work Copyrighted.

Section 3 of the Copyright Act provides:

"That the copyright provided by this Act shall protect all the copyrightable component parts of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright. The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this Act."

It is thus clear that the Appellate Court was in error in denying petitioner all relief on the theory that the entire publication was not identical in sequence and arrange-

ment, and, therefore, not similar enough to constitute infringement, for under this act the petitioner certainly is entitled to relief, if any one of the copyrightable component parts has been infringed. The test of infringement is not whether they are identical, but, under the well established rule of law, whether or not ordinary observation would cause the accused component parts to be recognized as being taken from petitioner.

It is perfectly clear from an ordinary observation of the master airline chart appearing on the inside back cover of respondents' publication and the Central and South American maps and the contents section and the listing sections that they would be recognized as being taken from petitioner, particularly when the respondents utterly failed to produce any source material in the public domain which corresponds therewith in any degree, insofar as expression, style, arrangement and garb is concerned, and particularly in view of the fact that respondents' employees who had to do with these component parts admitted they had before them several copies of petitioner's genuine publication at the time of preparing the respondents' publication.

The District Court found (R. 585) that as early as January 29, 1943 and prior thereto respondents deliberately and definitely conspired and planned between and among themselves to use petitioner's publication as their model and to copy from it and publish a copy of petitioner's model, and that they jointly and severally carried out such plan "with a few insignificant changes", and that the material alleged to have been received by the respondents from the airlines after February 11, 1943, pertaining to the April 1943 edition of respondents' accused publication did not influence any change in respondents' predetermined plan to copy from petitioner's publication and use it as their model in preparing the accused publication. The

Court of Appeals has not disturbed that finding in any shape, manner or form. Therefore, this case comes before this court with that finding undisturbed.

III.

In Copyright Law, a Copy Sufficient to Constitute Infringement Is One Which Ordinary Observation Would Cause to Be Recognized as Being Taken from the Original.

Daly v. Palmer, 6 Blatch. 270; *King Features Syndicate v. Fleischer, et al.*, 299 Fed. 533, (C. C. A. 2); *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U. S. 1; *Encyclopedia Britannica v. American Newspaper Association, et al.*, 130 Fed. 460, (C. C. N. J.), *aff'd* 134 Fed. 831 (C. C. A. 2).

This court, in *White-Smith Music Co. v. Apollo Co.*, 209 U. S. 1, in defining what constitutes an infringing copy in a copyright suit, speaking through Mr. Justice Day, said, at page 17:

“A definition was given by Bailey, J., in *West v. Francis*, 5 B. & A. 743, quoted with approval in *Boosey v. Whight, supra*. He said: ‘A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original.’”

IV.

A Copy, in Order to Be an Infringement, Need Not Be Identical in Sequence, Arrangement or Otherwise.

Callaghan v. Myers, 128 U. S. 617, at page 661; *Ansehl v. Puritan Pharmaceutical Co., et al.*, 61 F. (2d) 131, (C. C. A. 8), at page 138, and cases there cited; *King Features Syndicate v. Fleischer*, 299 Fed. 533, (C. C. A. 2), at page 535, and cases there cited; *Lawrence v. Dana*, Fed. Case No. 8,136, 4 Cliff. 80.

V.

Defendants Can Have No Immunity from Their Infringing Acts on the Facts Shown by This Record.

Jeweler's Circular Pub. Co. v. Keystone Pub. Co., 274 Fed. 932 at 934 (Circuit Judge Learned Hand), aff'd 281 Fed. 83 (C. C. A. 2); *Houghton Mifflin Co. v. Stackpole Sons, Inc., et al.*, 104 F. (2d) 306 (C. C. A. 2); *Triangle Publications v. New England Newspaper Pub. Co.*, 46 F. Supp. 198 (D. C. Mass.); *R. R. Donnelley and Sons Co. v. Haber, et al.*, 43 F. Supp. 456 (D. C. N. Y., Judge Campbell); *Hoague-Sprague Corporation v. Frank C. Meyer Co.*, 31 F. (2d) 583; *Deward & Rich v. Bristol Savings & Loan Corp.*, 29 F. Supp. 777 (D. C. Va.); Weil on Copyrights, 1917 Edition, page 207, Section 542; *Ansehl v. Puritan Pharmaceutical Co.*, 61 F. (2d) 131 (C. C. A. 8).

VI.

As Respondents Resorted to and Used Petitioner's Publication as a Whole, and Its Component Parts as Their Model to Pattern After, Directly and Indirectly, in Preparing Their Corresponding Publication, Charts, Maps and Other Component Parts Here Asserted, Petitioner Is Clearly Entitled to Relief Under the Authorities.

Springer Lithographing Co. v. Falk, 59 Fed. 707 (C. C. A. 2); *Hartfield v. Peterson, et al.*, 91 F. (2d) 998 (C. C. A. 2); *Deutsch et al. v. Arnold*, 98 F. (2d) 686, (C. C. A. 2); *Mecanno, Ltd. v. Wagner*, 234 Fed. 912, 922; *Edwards & Deutsch Lithographing Co. v. Boorman et al.*, 15 F. (2d) 35 (C. C. A. 7).

VII.

The District Court's Findings, Amply Supported by the Evidence, Should Have Been Followed and Adopted, and Not Disregarded by the Court of Appeals.

Adamson v. Gilliland, 242 U. S. 350; Rule 52 (a), Rules of Civil Procedure.

VIII.

Infringement Not Avoided by Copying Indirectly or Copying from a Copyist.

American Press Ass'n v. Daily Story Pub. Co., 120 Fed. 766 (C. C. A. 7); Amdur, Copyright Law and Practice (1936 Edition), page 688, Section 20; *Schumacher v. Schwencke*, 30 Fed. 690, 691 (D. C. N. Y.); *Gross, et al. v. Seligman, et al.*, 212 Fed. 930, 931 (C. C. A. 2).

CONCLUSION.

On the grounds and for the reasons set forth, we urge that the writ of certiorari requested be granted.

Respectfully submitted,

CLARENCE J. LOFTUS,

JOHN M. MASON,

Counsel for Petitioner.

October 20, 1945.